



5-1-1953

Recent Decisions

Carl F. Eiberger

Donald W. Bebenek

Walter C. Clements

Robert J. Hepler

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Carl F. Eiberger, Donald W. Bebenek, Walter C. Clements & Robert J. Hepler, *Recent Decisions*, 28 Notre Dame L. Rev. 398 (1953).
Available at: <http://scholarship.law.nd.edu/ndlr/vol28/iss3/7>

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Conclusion

The firmly established doctrine of right of privacy will undoubtedly be modified but little in its application to television. As shown by the result of the *Gautier* case, this new medium may further reduce the already small distinction between common law and statutory rights of privacy. The rules for determining liability for violation of the right by newspapers, magazines, motion pictures, and radio broadcasts can be applied in almost all situations involving television. In borderline cases only, where old rules do not apply because of television's unique feature — instantaneous transmission of the picture — the policy of the courts should be to favor the telecaster. Freedom of speech and of the press and public interest in news and general information in those situations are more important than the right of privacy.

Edward L. Burke

RECENT DECISIONS

CHURCH AND STATE — RELIGIOUS SOCIETIES — LEGISLATIVE CONTROL OF CHURCH PROPERTY — SUPREMACY OF ECCLESIASTICAL ADJUDICATIONS. — *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*,U.S....., 73 S.Ct. 143, (1952). This case involves an action of ejectment in which the issue was the right to possession and use of a cathedral in New York City. Appellants occupy the premises as the appointees of the Patriarch and Holy Synod of Russian Orthodox Greek Catholic Churches in Moscow. Respondents represent a separatist movement of the Russian Orthodox Church in the United States which developed after the revolution in Russia in 1917. This faction, though spiritually identical with the mother church, declared its administrative autonomy in 1924 because it refused to recognize a "Renovated Church" sponsored by the Bolshevik government (subsequently conceded to be schismatic).

Since 1945 both the separatist group and the appellant have recognized the spiritual leadership of the Russian Patriarch as that of the true church. The separatist group, however, has continued to contest the validity of the Patriarch's appointee in the United States. In 1945, the New York legislature enacted N.Y. REL CORP. LAW §§ 105—108, which as interpreted by the New York Court of Appeals, declared that all churches formerly subject to the administration of the mother church in Moscow, should be subsequently governed by the American separatist movement.

Respondents claim the right to possession and use of the Cathedral upon the strength of the rights conferred upon them by that statute. The

New York Court of Appeals upheld this contention, *St. Nicholas Cathedral of Russian Orthodox Church in North America v. Kedroff*, 302 N.Y. 1, 96 N.E.(2d) 56 (1950), declaring that though the statute on its face appeared to be unconstitutional as an invasion by the civil authority into church affairs, it was not so in fact. The court gave as its reason the authority which it had to judicially recognize the conditions which motivated the legislature in its action, namely, the recognition by the legislature of the present atheistic government in Russia and the fact that the Russian Church was a mere arm of the Soviet government. The court found that the legislature was justified in concluding that the American faction could be relied upon to carry out more effectively and faithfully the religious trust to which the church property had been dedicated.

Holding itself to be bound by the interpretation given the statute by the New York Court of Appeals, the Supreme Court reversed, holding that this attempt to pass ecclesiastical control from one church authority to another was an unconstitutional interference into Church affairs, in particular as prohibiting the free exercise of the ecclesiastical right of a church to chose its own heirarchy. This decision of the Supreme Court striking down legislative fiats interfering with religious liberty was merely another in that long line of cases that has reaffirmed our national policy of separation of Church and State as set forth in the First Amendment and applied to the states by the Fourteenth Amendment of the Federal Constitution. Cf., *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

Having thus disposed of the effect of the statute in the case, by declaring it unconstitutional, the Court turned its attention to the merits of the controversy. It adjudged that the appointee of the Russian Church in Moscow was the proper person to occupy and use the cathedral on the basis that the mother church was supreme in ecclesiastical matters. This ground upon which the decision was rested brought into focus again the question whether ecclesiastical adjudications by the supreme authorities of heirarchical churches are final and binding upon civil authorities even though such adjudications may involve rights to the possession and use of church property.

The leading case on this subject is *Watson v. Jones*, 13 Wall. 679, (U.S. 1871) in which a controversy had arisen between two factions of the Presbyterian Church in the United States over the right to the use and possession of church property. In that case the discord which led to the formation of the dissident faction arose over the issue of slavery. The Court upheld the right of the group recognized and approved by the General Assembly of the Church, that being the highest authority of the Presbyterian Church in the United States at the time. The general rule was set out by the court at 13 Wall. 727 as:

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of

church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and binding on them, in their application to the case before them.

This rule has been followed in the majority of jurisdictions, *Shepard v. Barkley*, 247 U.S. 1 (1918) (see the numerous cases cited therein); *Russian-Serbian Holy Trinity Orthodox Church v. Kulik*, 202 Minn. 560, 279 N.W. 364, 369 (1938); *Trustees of Presbytery of New York v. Westminster Presbyterian Church*, 222 N.Y. 305, 118 N.E. 800, 802 (1918); however, a few have repudiated it altogether, *Watson v. Garvin*, 54 Mo. 353 (1873); and attempts have been made to distinguish it, for example, *St. Nicholas Cathedral of Russian Orthodox Church of North America v. Kedroff*, 276 App. Div. 309, 94 N.Y.S.(2d) 453, 474 (1st Dep't 1950), upon such a variety of reasons that the leading authority on American church law was led to comment that, "... this portion of the law has become a perfect jungle, a wilderness of cases, a river of doubt, and a despair to all concerned." ZOLLMAN, *AMERICAN CHURCH LAW* 65 (1933).

Despite the wilderness, the broad outlines of the rules of law in the field, both those followed by the majority and those of the minority are capable of definition. Both the majority and minority recognize that civil courts cannot interfere in strictly ecclesiastical controversies, because of their lack of jurisdiction under the American system of complete separation of Church and State, *Presbytery of Bismark v. Allen*, 74 N.D. 400, 22 N.W.(2d) 625, 628 (1946). Civil courts are denied jurisdiction in church matters because problems of doctrine and theology are too difficult of comprehension and decision to permit the judges of a civil court to become a final arbiter thereon. *Moustakis v. Hellenic Orthodox Soc.*, 261 Mass. 462, 159 N.E. 453 (1928).

Both majority and minority agree that civil courts can take jurisdiction over a controversy even though it involves ecclesiastical matters, if and only if, the ecclesiastical determination will affect property rights. In such cases, the matters of doctrine and theology or other purely ecclesiastical problems are treated as incidental to the determination of the property rights. *First English Lutheran Church v. Evangelical Lutheran Synod*, 135 F.(2d) 701, 703 (10th Cir.), *cert. denied*, 320 U.S. 757 (1943); *Presbytery of Bismark v. Allen, supra*, 22 N.W.(2d) at 631-32.

The main point of disagreement between the majority and minority views in this problem is the binding effect and validity of ecclesiastical adjudications in regard to the property rights. The majority maintains that such determinations are not only binding on the courts, but that the civil court is precluded from inquiring into even the essential validity of them. *Bouchelle v. Trustees of the Presbyterian Congregation*, 22 Del. 58, 194 Atl. 100, 103 (Ch. 1937); *Board of Trustees of Kansas Annual*

Conference of Church of United Brethren in Christ v. Mt. Carmel Community Cemetery Ass'n, 152 Kan. 243, 103 P.(2d) 877 (1940). The minority, on the other hand, in effect limits the majority rule to non-property cases and states that if property rights are concerned the ecclesiastical authorities have no power whatsoever to adjudicate regarding them. Ecclesiastical decisions are not only not binding, but their propriety can be investigated. *Watson v. Avery*, 65 Ky. (2 Bush) 332 (1867); *Bear v. Heasley*, 98 Mich. 279, 57 N.W. 270 (1893); *Watson v. Garvin*, *supra*; *Landrith v. Hudgins*, 121 Tenn. 550, 120 S.W. 783, 815 (1907).

The minority rule in this country is the prevailing rule in England, *Craigdallie v. Aikman*, 2 Bligh 529, 4 Eng. Rep. 435 (H.L. 1820), though this is no doubt due to the position of ecclesiastical courts in that country. But only one American court, in an early case, *Smith v. Nelson*, 18 Vt. 511 (1846), had not recognized the binding force of ecclesiastical adjudications until the aforementioned controversy in the Presbyterian Church produced the leading case of *Watson v. Jones*, *supra*, and the first clear statement of the minority position, *Watson v. Avery*, *supra*, and *Watson v. Garvin*, *supra*. There are varied reasons given in substantiation of the minority view: that ecclesiastical adjudications only call for voluntary obedience and are not final or binding in a legal sense, *Smith v. Nelson*, *supra*, 18 Vt. at 557-8; that the church should not have the power to confiscate property without restraint, *Watson v. Garvin*, *supra*, 54 Mo. at 368, 381; and that in effect such a rule makes the will of the assembly or tribunal the fundamental law and not that of the rules of the church, *Watson v. Avery*, *supra*, 65 Ky. (2 Bush) at 349. The few jurisdictions which follow the minority rule have weakened their position by a lack of consistency in their application of it. For example, in Missouri the case of *Hayes v. Manning*, 263 Mo. 1, 172 S.W. 897, 905 (1914) accepted the majority rule — but the latest lower court decision reverted to the former minority holding. *Murr v. Maxwell*, 232 S.W.(2d) 219, 234-36 (Mo. App. 1950).

In addition to the strict minority rule as espoused by these few jurisdictions, there are many courts which apply the general rule with slight variations or exceptions, but agree in substance with the supremacy of church decisions. The exceptions are based mainly on the consideration of whether the civil court should accept ecclesiastical decisions as conclusive without being able to ascertain by any investigation deemed necessary whether the tribunal was acting within its jurisdiction, *i.e.* in accord with its procedures and organic laws — in short, the validity of the tribunal itself. While the minority view deems this necessary and proper, the majority rule, in its attempt to preserve Church-State separation, admits of no such investigation. However, the rule as enunciated by the court in very broad language, seemingly would not exclude such investigations in a proper case.

These courts have attempted to distinguish the rule of *Watson v. Jones*, *supra*, on the basis that the courts can interfere when it is manifestly obvious that there has been an abandonment of the tenets of the church, and church action has been taken that is palpably erroneous and in excess of the tribunal's jurisdiction. *Mack v. Kime*, 129 Ga. 1, 58 S.E. 184 (1907). Interference is also permitted where there is a possibility of fraud, collusion or arbitrariness on the part of the church authorities, *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929); *Turberville v. Morris*, 203 S.C. 287, 26 S.E.(2d) 821, 828 (1943); or if the decisions are plainly violative of the civil law of the state or the canons of the church, *Canovaro v. Brothers of Order of Hermits of St. Augustine*, 326 Pa. 76, 191 Atl. 140, 146 (1937); *Krecker v. Shirey*, 163 Pa. 534, 30 Atl. 440, 443 (1894); or in the obvious case of usurpers of the true authority, *Bouldin v. Alexander*, 15 Wall. 131 (U.S. 1872).

Further considerations are involved when the controversy involves a schism within a hierarchical church, as in the instant case. In such cases, the minority view, on the theory of an implied trust, holds that civil courts are empowered to give the disputed property to the faction which continues in harmony with the laws, usages and customs accepted by the ecclesiastical body before the dispute arose. *Nagle v. Miller*, 120 Pa. 157, 118 Atl. 670 (1922). This view, however, is more properly applied by courts where the controversy involves a schism in a congregational church; and necessitates an inquiry into the internal affairs, doctrines and beliefs of the church, in opposition to the majority rule. *Mack v. Kime*, *supra*. The majority rule regards property that has been dedicated to general church purposes or to the denomination, as belonging to the church to be held in trust by the general church body and used in accordance with the decisions of the supreme church authorities. *Kelly v. McIntire*, 123 N.J. Eq. 351, 197 Atl. 736, 741 (Ch. 1938); *Presbytery of Bismark v. Allen*, *supra*, 22 N.W.(2d) at 631. Their view is that, in the case of a schism the property goes with the faction that is identical with the original church. This is strictly a matter of identity and there is no occasion to inquire into the religious opinions of those who comprise the legal and regular organization. The question is, which is the true church. Those who adhere to, and are recognized by, the acknowledged organization are entitled to the use of the property, whether adhering or not to the doctrines originally professed. Such recognition by the higher authorities of one of the factions is followed as binding on the courts. *Presbytery of Bismark v. Allen*, *supra*, 22 N.W.(2d) at 629; *First Baptist Church of Paris v. Fort*, 93 Tex. 215, 54 S.W. 892 (1900).

When the schism or controversy involves a dispute concerning the highest church authorities, however, the majority rule is seemingly rendered inapplicable because of the lack of a supreme recognized authority which the courts can accept as a guide. This situation has led

to a judicial holding that the majority rule does not apply in these cases, *Ramsey v. Hicks*, 44 Ind. App. 490, 87 N.E. 1091 (1909), *rev'd*, 174 Ind. 428, 91 N.E. 344 (1910); and in *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136 (1883), the court made inquiry into the ecclesiastical law, usages and customs to determine which of the conflicting groups should be recognized as the supreme authority. The general rule followed by the majority of courts in such cases, however, has been to presume the validity and regularity of the group which keeps the name and form of the original church as against the one that withdraws. *Kedrowsky v. Rojdesvensky*, 214 App. Div. 483, 212 N.Y. Supp. 273 (1st Dep't 1925), *aff'd*, 242 N.Y. 547, 152 N.E. 421 (1926).

Although the Court would not have been without precedent should it have chosen to apply the minority rule in the instant case, in view of the unique problems involved, its choice of the majority rule appears to have been wisely made. This is especially true since both factions involved in the controversy have, since 1945, recognized the Russian Patriarch as the true Head of the Church. Under this circumstance the controversy reduced itself, in the eyes of the court to an internal schism over administrative control, with a final authority recognized within the church itself whose decisions in regard to ecclesiastical matters the courts must accept as binding. The simplicity with which the Court seemingly disposed of the problem points up the possibility that the New York Legislature and the courts of that state, in placing too great emphasis upon expediency and political and historical considerations had lost sight of the more basic concept of church supremacy in church matters. The reaffirmation of that concept by the highest court in the land seems to have been very timely and should lay at rest any similar attempts to circumvent or repudiate it.

Carl F. Eiberger, Jr.

CONFLICT OF LAWS—DOMESTIC RELATIONS—FULL FAITH AND CREDIT—WHETHER SEPARATE MAINTENANCE ORDER IS MERGED BY SUBSEQUENT FOREIGN DIVORCE DECREE.—*Isserman v. Isserman*, 11 N.J. 106, 93 A.(2d) 571 (1952). The plaintiff-appellant in this action, a married woman, obtained a separate maintenance order from a New Jersey court in 1927. Subsequently, in 1943, her husband, defendant-respondent, received a divorce *a vinculo* in the courts of Nevada, the wife appearing in this action both by counsel and personally. The decree of divorce incorporated a property settlement agreed to by the parties prior to the action which was materially at variance with the original New Jersey decree. The divorce decree also declared the former separate maintenance order null and void. The wife later brought suit in a New Jersey court

for the husband's failure to pay on the prior support order. The husband petitioned the court to dismiss the complaint, asserting that the Nevada divorce decree determined all the issues in the controversy and thus constituted a bar to this action. From an adverse judgment the wife appealed.

The Supreme Court of New Jersey held that because there was a full determination on both the marital status and the property rights by a court having personal jurisdiction over both parties, the Nevada decree of absolute divorce is a bar to any further litigation on these points. In this respect the decision is clearly in line with the weight of authority in the United States on this issue.

However, the court went on to say, 93 A.(2d) at 575:

This is subject to the exception that where there is a failure to apply in the divorce proceeding for alimony in substitution for the support order granted in the maintenance proceeding, this is merely a procedural defect and the decree of divorce alone does not merge or vacate a prior order for separate maintenance.

At first glance this dictum would seem to suggest a departure from the established rules in this much litigated field. As might be expected, however, there is a logical explanation.

The questions of foreign divorce, the extent to which foreign decrees are entitled to full faith and credit, the conflicts with the policy and interests of the state and its domiciliaries, have been problems of great magnitude for the courts to handle. The best known clarification and a milestone in the subject was *Williams v. North Carolina*, 317 U.S. 287 (1942), which overruled *Haddock v. Haddock*, 201 U.S. 562 (1906). The *Williams* case held that where a court has jurisdiction over *one* domiciled in that state, a divorce from the absent spouse should be given full faith and credit in a sister state provided the proper steps for notice and service had been followed. From this holding, the rule logically followed that if a court has jurisdiction over *both* of the parties, the domicile of the complainant having been fully established, full faith and credit should be given by a sister state to a decree destroying the marital status.

The *Williams* case settled the rule in regard to the marital status. But a new concept comes into view when a prior valid support and maintenance decree is involved. Here the state of original jurisdiction has an additional interest. The concurring opinion in *Esenwein v. Commonwealth*, 325 U.S. 279, 282 (1945), stated that although state policy must give way to the larger federal interests, still the state of domicile of the wife has a deep concern over the family and its future support, and the courts should see that wives and children do not become wards of the state. Therefore, it appears that a closer scrutiny must be given to a judgment of a sister state when a prior separation and maintenance decree is involved.

The case of *Estin v. Estin*, 334 U.S. 541 (1948), sheds further light on the issue at hand. In that case, the Supreme Court adopted the doctrine of "divisible divorce," whereby the marital status is dissolved but the obligation of support subsists. The Court required that full faith and credit be given to the Nevada decree as regards the severance of the matrimonial bonds, however, because of the lack of personal jurisdiction over the wife and the failure of the Nevada court to mention the issue of alimony in its decree, the prior separation and maintenance order of the New York court was not affected by this decree and remained valid and subsisting. This ruling was based on the fact that the New York decree of separate maintenance was a property decree of that state and the wife never permitted her property rights to be embraced by a Nevada jurisdiction.

A subsequent New York case is closer to the point in question here. In *Lynn v. Lynn*, 302 N.Y. 193, 97 N.E.(2d) 748 (1951), there was personal jurisdiction over both of the parties. A prior separation and maintenance order was in existence and a Nevada court rendered its decree of divorce *a vinculo* without mention of this order nor the question of alimony. The Court of Appeals of New York held that the rights of the parties had been completely adjudicated in this action and, in giving full faith and credit to this decree, it could not regard the prior separation and maintenance order as still in existence. The court reasoned that as there was personal jurisdiction over both of the parties, all the rights connected with the marital relationship were adjudicated and this terminated the separation decree.

As a result, it is to be noted that if there is not personal jurisdiction over both of the parties, the courts of a sister state will give full faith and credit to the decree as dissolving the marital status, but will not allow the foreign decree to abolish the prior separate maintenance decree. However, when there is personal jurisdiction over both of the parties, full faith and credit will be given to an adjudication of all the incidents of the marriage, including the prior separation decree, whether or not it is mentioned in the decree of divorce.

It seems therefore, that the statement made by the New Jersey court, quoted above, is in conflict with these principles. How are the two to be reconciled? Is this a contrary decision adding confusion to the field? The answer lies in N. J. STAT. ANN. § 2:50-37 (1939) which provides:

... after decree of divorce, whether obtained in this State or elsewhere, the Court of Chancery may make such order touching the alimony of the wife ... as the circumstances of the parties and the nature of the case shall render fit, reasonable and just. ...

The court, it is evident, founded its statement upon this statute and therefore a vital distinction can be made between the decision in the instant case and others based upon case law. This statute gives the court the power in a case where neither the prior separate maintenance order

nor alimony is mentioned in the divorce decree, to consider the separation order as valid and subsisting if the justice of the case so demands.

In addition to furnishing the point of distinction for the dictum in this case, the New Jersey statute might also well be considered by the legislators of other states as a solution to the difficulty and inequity which follows a foreign divorce decree where the parties have, possibly through inadvertence, failed to make provision for alimony or maintenance.

Donald W. Bebenek.

CONSTITUTIONAL LAW — LOYALTY OATH STATUTE — SCIENTER. — *Wieman v. Updegraff*,U.S....., 73 S.Ct. 215 (1952). Appellee, Updegraff, brought suit as a citizen and taxpayer in the District Court of Oklahoma County to enjoin the necessary state officials from making further salary payments to appellants, members of the faculty and staff of Oklahoma Agricultural and Mechanical College, who had not submitted to a loyalty oath prescribed by Oklahoma statute for all state officers and employees. OKLA. STAT. tit. 51, § 37.2 (1951).

The portion of the oath objected to by appellants would have had them swear that within five years immediately preceding the taking of the oath, they had not been members of any group or organization which had been officially determined by the United States Attorney General or other authorized public agency of the United States to be a Communist-front or subversive organization. The appellants, who were permitted to intervene, attacked the validity of the Act on the grounds, among others, that it was "a bill of attainder; an *ex post facto* law; impaired the obligation of their contracts with the State and violated the Due Process Clause of the Fourteenth Amendment." The court upheld the Act and enjoined the state officers from making further salary payments to appellants.

The Supreme Court of Oklahoma affirmed, *Board of Regents v. Updegraff*, 205 Okla. 301, 237 P.(2d) 131 (1951), and the Supreme Court of the United States noted probable jurisdiction because of the "public importance of this type of legislation and the recurring serious constitutional questions which it presents." The judgment was reversed and the statute declared violative of due process because it indiscriminately classified innocent and knowing association or membership together.

In *Dennis v. United States*, 341 U.S. 494 (1951), the Court held that the Smith Act, 18 U.S.C. § 2385 (Supp. 1952), requires as an essential element of the crime, proof of the intent of those who are charged with its violation to overthrow the Government by force and violence. Three other recent cases have declared the constitutionality of statutes requiring loyalty oaths to hinge upon their differentiating between "join-

ers" who had knowledge of organizational purposes, and those who had innocently joined organizations, which the Attorney General later designated as subversive or as a Communist-front.

In *Adler v. Board of Education*, 342 U.S. 485 (1952), the Supreme Court upheld the constitutionality of the Feinberg Law, N.Y. EDUCATION LAW § 3022, which provides that membership in any organization listed as advocating the overthrow of the government by force, violence or other unlawful means would be prima facie evidence of disqualification for employment in the public schools. The Supreme Court noted that the New York courts had construed the statute to require knowledge of organizational purpose before the regulation would apply.

The case of *Garner v. Board of Public Works*, 341 U.S. 716 (1951), considered a Los Angeles city ordinance which required every employee to take an oath that, within a five year period prior to the enactment of the ordinance, he had neither been a member nor affiliated with disloyal groups which advocated the violent overthrow of the Government. The employees also had to execute an affidavit as to their membership in the Communist Party at any time. In this case, though the oath was similar to the one to be taken in Oklahoma, insofar as it did not require *scienter* expressly, the Court called attention to the fact that in *People v. Steelik*, 187 Cal. 361, 203 Pac. 78, 84 (1921), the Supreme Court of California had interpreted a criminal syndicalism statute so as to require knowledge of the character of the proscribed organization as of the time of affiliation. Accordingly, *scienter* was assumed to be implicit in each clause of the subversive oath, and it was held constitutional.

Finally, in *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951), an appeal was taken from a decision of the Court of Appeals of the State of Maryland, the effect of which was to deny the appellant a place on the ballot for a municipal election because of her refusal to file an affidavit required by state law. MD. ANN. CODE GEN. LAWS art. 85A, § 15 (1952). Upon receiving assurance from the Maryland Attorney General that the affiant could make knowledge of organizational purpose a condition in the oath, the Supreme Court declared the statute valid.

These cases, in varying degrees, have made *scienter* a requisite to the constitutionality of the oaths which they consider. On this ground, at least, there is uniformity in the loyalty oath cases. However, beyond this element, it is difficult to find the clarity one might desire.

Among the first cases to reach the courts on this problem of test oaths were those dealing with statements of loyalty to the Union, made mandatory for certain specified occupations and activities after the Civil War. In these cases, the courts held that such oaths were unconstitutional where they were made prerequisite to offices or occupations which men have as natural or inalienable right or liberty or as a civil right; e.g., teaching, *State v. Heighland*, 41 Mo. 388 (1867); performing priestly

duties, *Cummings v. Missouri*, 4 Wall. 277 (U.S. 1867); practicing as an attorney before the courts, *Ex parte Garland*, 4 Wall. 333 (U.S. 1867); seeking rehearing in litigation, *Pierce v. Carskadon*, 16 Wall. 234 (U.S. 1873). These oaths operated as bills of attainder, punishing without trial through a deprivation of rights. On the other hand, such oaths were declared constitutional when they merely prescribed certain conditions or qualifications, which, when complied with, would enable one to exercise a privilege or franchise and did not interfere with a "natural right." *Blair v. Ridgely*, 41 Mo. 63 (1867) (privilege of voting).

This distinction made on the basis of the nature of the office or occupation has been continued in the recent cases. *Garner v. Board of Public Works*, *supra*, held that public employment is a privilege conferred by the state, and is therefore subject to the reasonable qualifications and requirements laid down by the state. This same conclusion was reached, in effect, in *Steiner v. Darby*, 88 Cal. App.(2d) 481, 199 P.(2d) 429 (1948), *cert. granted*, 337 U.S. 929, *cert. dismissed*, 338 U.S. 327 (1949), which held that county employees, as employees of the government, have foregone any privilege they may have had as private citizens to advocate the overthrow of the government. Therefore, a loyalty oath and affidavit containing among other things a denial of present or antecedent affiliation with any subversive group, was not unconstitutional.

This line of distinction as to what constitutes a bill of attainder because interfering with a natural as opposed to a civil activity or occupation has not remained clear however. In *Tolman v. Underhill*, 229 P.(2d) 447 (Cal. App. 1951), the court held that a group of faculty members of the University of California could not be deprived of their positions for failure to swear to a loyalty oath prescribed by the regents of the university. This conclusion was reached on the basis of a constitutional provision which prescribed the form of oath to be taken by civil officials and provided that no other oath, declaration or test be required as a qualification for any office or public trust. CAL. CONST. Art. XX, § 3. Thus the civil nature of the employment served in this case as a safeguard rather than as a reason for greater severity.

Because of the powerful position of labor unions and the danger in interstate commerce from possible political strikes, the Supreme Court in *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950), held that it was not unconstitutional to require officials of unions to file declarations of loyalty (non-Communist affidavits), or to penalize their organizations by depriving them of certain provisions of the National Labor Relations Act, 49 STAT. 449 (1935), as amended, 29 U.S.C. § 141 (Supp. 1952), for their failure or refusal to do so. This was not a bill of attainder as it did not punish for past acts, but was only intended to prevent future action, and a union official could obtain the benefits for his organization by merely changing his relationship with those deemed

disloyal. These cases illustrate the fact that the line of distinction between civil offices or other privileges, and vocations or occupations followed as a natural right, is not adequate to meet all the possible situations. The courts have not, and probably in the future will not, hesitate to disregard this distinction where necessary.

Nor is there a great amount of certainty as to when a loyalty oath is unconstitutional as being *ex post facto*. Some of the oaths explicitly state their present and future operation, thereby avoiding any possibility of confusion, *Dworken v. Cleveland Board of Education*, 94 N.E.(2d) 18 (1950), *aff'd*, 108 N.E.(2d) 103, *appeal dismissed*, 156 Ohio St. 346, 102 N.E.(2d) 253 (1951). See also, *American Communications Ass'n v. Douds*, *supra*. Others do operate retrospectively such as the oath considered in *Garner v. Board of Public Works*, *supra*, 341 U.S. at 721. However, the ordinance prescribing the oath in that case had been preceded in 1941 by an amendment to the city charter providing for an oath of loyalty. Since the ordinance did not extend beyond the date on which the change in the charter had been effected, it was not *ex post facto*.

In the instant case there was no need for passing on the retrospective element of the oath in question, since the failure to include *scienter* was a conclusive defect. The question however presents itself as to what would have been the effect of the retroactive functioning of the oath, had the problem of *scienter* not been present.

The decision in the instant case, while it presents no new direction for loyalty oath cases, does serve to strengthen the United States Supreme Court's previous refusal to allow the uncertainty of the "cold war" to interfere with the traditional concept of knowledge as a necessary element of any form of guilt. It is to be hoped that the problems and ambiguities which still exist concerning the extent to which loyalty oaths may be constitutionally required and the types of activity and occupation which fall within their restrictions, will be dealt with as clearly and with as ardent a desire for the preservation of liberty.

Walter C. Clements.

CORPORATIONS — DIRECTORS AND OFFICERS — STANDARD OF CARE IN CONDUCTING CORPORATION AFFAIRS. — *New York Credit Men's Adjustment Bureau, Inc. v. Weiss*, 305 N.Y. 1, 110 N.E.(2d) 397 (1953). The defendants, as directors, officers, and sole stockholders of the W. F. Irish Co., being unable to obtain additional funds by loans or other means decided it was impossible to continue business any longer. The corporation had on its balance sheet an estimated inventory of \$73,492.21 on December 31, 1948. The cost value as inventoried on February

4, 1949, was at least \$60,000.00. There were bills outstanding of \$52,000.00. The defendants chose to liquidate the corporate assets through a public auction sale and obtained an auctioneer for this purpose and turned the assets over to him. He advertised the liquidation auction in the normal manner for a sale of this type, but the creditors of the corporation were not specifically notified. The net proceeds of the sale were \$19,866.98. Shortly after this sale the creditors petitioned the corporation into involuntary bankruptcy. The creditors of the corporation, represented by the trustee in bankruptcy, then sued the directors for waste of the corporations assets under § 60(2) of the New York General Corporation Law.

The Supreme Court of New York entered a judgment in favor of the defendants and dismissed the complaint on its merits. The Appellate Division, *New York Credit Men's Adjustment Bureau, Inc. v. Weiss*, 278 App. Div. 501, 105 N.Y.S. (2d) 604 (1st Dep't 1951), reversed and ordered a new trial solely for determining damages. The Court of Appeals upheld the decision of the Appellate Division and placed the burden upon the defendants to show that the sale was not an improper and improvident depletion of the assets occasioned through neglect or failure to perform their fiduciary duties.

The case raised the problem of the degree of care required of an officer or director of a corporation in carrying on the affairs of the corporation. The opinion of the majority of the court followed the old and well established standard of the New York courts; the director is required to use that amount of care and prudence that he would use in running his own affairs. *Bayer v. Beran*, 49 N.Y.S.(2d) 2, 5 (Sup. Ct. 1944); *Hun v. Cary*, 82 N.Y. 65 (37 Sickels 1880). This view is opposed by the rule that the care required is only that of any reasonably prudent corporation officer or director conducting the affairs of his corporation under similar circumstances, *Briggs v. Spaulding*, 141 U.S. 132, 152 (1891); *Atherton v. Anderson*, 99 F.(2d) 883 (6th Cir. 1938); *Anderson v. Bundy*, 161 Va. 1, 171 S.E. 501, 507 (1933).

It must be recognized that these two opposite views are both well founded on reasonable principles. The New York rule is based on the security of the investor, creditor or depositor of a corporation or bank. If the directors were not to be held liable for a great degree of care, the money placed in their hands would be insecure. Such insecurity is diminished by requiring the directors to exercise the same degree of care they would use in their own affairs, *Hun v. Cary*, *supra*, 82 N.Y. at 71, and the creditors should be more willing to let their money be used. However, while security is an essential element it is not the only one to be considered. The strictness of the New York rule would seem to make it more difficult to obtain the better, more responsible men for positions as directors and officers. If the conduct of a director is to be judged by such a strict standard, equivalent to that required of an agent or trustee

of a private estate, as stated in *Spering's Appeal*, 71 Pa. 11, 21 (1872), "... no gentlemen of character and responsibility would be found willing to accept such places." While this may have been an exaggeration of the situation it does point out the problem.

To require of a director the care which any reasonably prudent director or officer under similar circumstances would exercise is the rule adopted by the codifiers of the Model Business Corporations Act, § 33, 9 UNIFORM LAWS ANN. 118 (1951). This rule, stated to be the majority and preferable one, sets a uniform standard for all men in the same business and is followed by statute in several states. IDAHO CODE ANN. § 30-142 (1948); KY. REV. STAT. ANN. § 271.365 (Baldwin Cum. Supp. 1953); LA. REV. STAT. ANN. § 12:36 (West 1950); MICH. STAT. ANN. § 21.47 (Cum. Supp. 1951); WASH. REV. CODE § 23.60.080 (1951). Several treatises also support this view. BALLANTINE, CORPORATIONS § 63 (Rev. ed. 1946); 2 THOMPSON, PRIVATE CORPORATIONS § 1410 (2d ed. 1909). This standard gives a directive which is not only less strict than the first but is also more uniform. The creditors and depositors are able to depend on this uniformity in all their dealings with any corporation and thereby gain the security they desire. At the same time able business men are given a measuring stick of conduct so they need not fear entering the field as directors or officers.

The majority of the court in holding that the directors failed in the performance of their fiduciary duty support the strict view. It is clear that the defendants were free to sell the assets as they did and were violating no law in so doing. There were other options open to them, such as the bankruptcy proceedings, but they were not bound to use them. Recognizing this, the court still held, in view of the heavy loss at the auction sale and the failure of the defendants to notify their creditors of the sale, that they had violated their fiduciary duty as directors by not exercising the required degree of care. It appeared clear to the court that the failure to supervise or conduct the liquidation auction, coupled with the failure to notify the creditors, was not carrying on the business as they would have carried on their own affairs. The court pointed out that the failure to conduct or supervise the auction was not in itself so much the breach of the duty as was the very choosing of the auction as the means of disposing of the assets. By choosing the auction, the defendants failed to meet the standard of care necessary. For these reasons the court reversed the normal procedure and placed on the defendants the burden of proving that they had not wasted the assets of the corporation. *Accord*, BALLANTINE, CORPORATIONS § 63b (Rev. ed. 1946).

In view of the New York rule, the majority decision would seem to be acceptable. It does, however, leave room for dispute in its attempt to set out a clear line of division between negligence and mistake of judgment. The dissent takes the view that their acts were a mistake of judgment

and that there is no liability for a mistake of judgment, *Briggs v. Spaulding*, *supra*. The dissent by bringing up the matter of mistake of judgment vividly points out the conflict between the two standards of care discussed above. It is impossible to simply state that where the amount of loss is great there was negligence and where it was small there was a mistake of judgment. All the facts must be weighed and carefully considered. The directors, by acting as others in the same situation had acted, were, under the strict rule, liable for negligence in conducting the affairs of the corporation. Under the liberal view they would at the most have been guilty of a mistake in their judgment. The very same acts and decisions bring about diametrical results.

While it is not probable that either is the ultimate solution, the liberal view is more conducive to a just solution to this problem. In the absence of such outstanding deciding elements as fraud or deceit, the court's majority view works a grave hardship on directors of a corporation in situations similar to the one in the principle case. By observing the actions of others and making their decisions thereon the directors sought to make the right decision. In so doing, practically any means they might have chosen, that lost a great amount of money, would have fallen short of the degree of care used by a man *in his own business affairs*. Considering these factors it seems clear why a majority of the authorities support the liberal view.

Robert J. Hepler.

EMINENT DOMAIN — VIOLATION OF ZONING RESTRICTIONS BY MUNICIPALITY — NECESSITY OF COMPENSATION. — *McKinney v. City of High Point*, 237 N.C. 66, 74 S.E.(2d) 440 (1953). The defendant city purchased a lot across the street from plaintiff's home, in a district zoned by its own ordinances as "Residence 'A' District" wherein only dwelling houses were permitted. It proceeded to build a water tank thereon which, when completed, rose 184 feet above the ground. Ordinances also provided that no public building should be more than sixty feet high. The plaintiff brought an action alleging, *inter alia*, that the construction and operation of the tank constituted actionable negligence, that the water tank had cheapened plaintiff's property and constituted an unlawful appropriation, that the tank was a nuisance, and that the present use of the property by the city had violated the ordinance and had defeated the purpose for which the district was zoned.

The city demurred on the grounds generally, that there was no such invasion as would constitute a physical taking of plaintiff's property or property rights and that the city performed a governmental function by supplying water and was therefore immune to any tort liability. The lower court overruled the demurrer, and on appeal the Supreme Court

of North Carolina modified the lower court's ruling by denying liability wherever the cause of action appeared in tort, but affirmed it insofar as the allegations showed damages from a taking of private property for public use. While the court held that zoning ordinances did not apply to a city performing governmental functions, it pointed out that governmental immunity did not extend to the taking of property interests without compensation to the owners of the property.

This decision was based upon the recent case of *City of Raleigh v. Edwards*, 235 N.C. 671, 71 S.E.(2d) 396 (1952), where, treating the matter for the first time, the Supreme Court of North Carolina held that negative easements, created by covenants restricting the use of property, constituted a vested interest in land for which compensation must be paid when the property is condemned. See Note, 31 N.C.L. REV. 125 (1952). The decision in the instant case differs only in the respect that the plaintiff's property rights, in the form of an equitable or negative easement, arose from the zoning ordinance instead of a private restrictive covenant. Although the defendant city, acting in the interest of public health and safety, had a right to erect the water tank, it was bound to pay compensation for any damage to the plaintiff's property interests, and not to do so would be a breach of the provisions of the state and federal constitutions.

The property rights arising from restrictions on the use of land generally find their basis in conveyance. CLARK PRINCIPLES OF EQUITY § 96 (1937). Historically, the finding that restrictions on the use of land create an equitable property interest has its source in the case of *Tulk v. Moxhay*, 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848), and the classification of such an interest as property in the cases of *In re Nisbet & Potts' Contract*, [1905] 1 Ch. 391, 399, aff'd, [1906] 1 Ch. 386, 395-6; *The Long Eaton Co. v. Midland Ry.*, [1902] 2 K.B. 574. In this country the recognition of the equitable easement as a property right has not gone unchallenged. Each case to be considered in this discussion involves the acquisition by eminent domain and a denial or affirmation of the existence of a property right in the form of an easement.

Those jurisdictions which do not follow the English courts do not admit the existence of a property right, or if they do admit it, hold the right void as against the acquiring agency. The case most relied on in accord with this view is *United States v. Certain Lands*, 112 Fed. 622 (C.C.D.R.I. 1899), aff'd sub nom. *Wharton v. United States*, 153 Fed. 876 (1st Cir. 1907). Here, the land was taken by the government for coastal defense purposes. Some parcels were subject to covenants prohibiting certain uses, including among others, any trade or business which was noxious, dangerous or offensive. The court held that the use for which the land was acquired was not contrary to the restrictive covenant. The decision, however, did not stop there, but went on to say, 112 Fed. at 629:

While the owners may so contract as to control private business, and thereby increase the values of their estates, they are not entitled so to contract as to control the action of the government. . . . Each land owner holds his estate subject to the public necessity for the exercise of the right of eminent domain for public purposes. He cannot evade this by any agreement with his neighbor, nor can his neighbor acquire a right from a private individual which imposes a new burden upon the public in the exercise of the right of eminent domain.

On error to the Circuit Court of Appeals for the First Circuit, *Wharton v. United States*, 153 Fed. 876 (1st Cir. 1907), the decision was affirmed. As regards the vested property interests claimed by the complainants, the court stated, 153 Fed. at 878, that such rights are mere contractual provisions "often incorrectly spoken of as negative easements. . . . If they were in fact easements, they would constitute true hereditaments, and the plaintiff in error would be entitled to the allowance of damages even if nominal."

Cases in accord with this view and holding such restrictive covenants void as against the acquiring agency are: *Moses v. Hazen*, 69 F.(2d) 842 (D.C. Cir. 1934); *Friesen v. City of Glendale*, 209 Cal. 524, 288 Pac. 1080 (1930) (see criticism in 19 CALIF. L. REV. 58 (1930)); *Anderson v. Lynch*, 188 Ga. 154, 3 S.E.(2d) 85 (1939); *Doan v. Cleveland Short Line Ry.*, 92 Ohio St. 461, 112 N.E. 505 (1915); *City of Houston v. Wynne*, 279 S.W. 916 (Tex. Civ. App. 1925), *aff'd*, 115 Tex. 255, 281 S.W. 544 (1926).

Those jurisdictions which grant compensation to the property owner when land subject to restrictive covenants is taken by eminent domain proceedings maintain that they are the majority. This appears to be correct since, not counting one recent federal case, *United States v. Certain Land*, 49 F. Supp. 265 (E.D.N.Y. 1943), where the issue was termed too "serious" to be disposed of on a motion to intervene, there are eight, possibly nine, jurisdictions which hold that restrictions upon the use of land create a vested property interest for the taking of which compensation is necessary.

The most frequently cited case in the majority group is *Town of Stamford v. Vuono*, 108 Conn. 359, 143 Atl. 245 (1928), where it was held that property owners in a restricted residential area were entitled to compensation on the ground that the restrictive covenants created a vested interest in land in the nature of an easement, which interest was taken when the municipality built a school adjacent to their lands. *Accord*: Massachusetts, *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 117 N.E. 244 (1917); *Ladd v. City of Boston*, 151 Mass. 585, 24 N.E. 858 (1890); Michigan, *Johnstone v. Detroit G. H. & M. Ry.*, 245 Mich. 65, 222 N.W. 324 (1928); Minnesota, *Klaproth v. Griniger*, 162 Minn. 488, 203 N.W. 418 (1925); Missouri, *Peters v. Buckner*, 288 Mo. 618, 232 S.W. 1024 (1921); North Carolina, *City of Raleigh v. Edwards*, *supra*; New Jersey, *Hayes v. Waverly & P. R.R.*,

51 N.J. Eq. 345, 27 Atl. 648 (Ch. 1893) (*But cf. Herr v. Board of Education*, 82 N.J.L. 610, 83 Atl. 173 (1912); New York, *Flynn v. New York W. & B. Ry.*, 218 N.Y. 140, 112 N.E. 913 (1916); Wisconsin, *Fuller v. Town Board*, 193 Wis. 549, 214 N.W. 324 (1927) *semble*. In this last case, an award of compensation had already been made to adjoining land owners for their losses occasioned by the violation of the restrictive covenant. Although the court recognized that the interest which they had in the maintenance of the restriction was a property right, and refused to disturb the town board's action because of the awards made, it gave no official approbation, declaring rather that a decision on the right of adjoining owners to compensation was not necessary to the solution of the case.

Public policy, which governs certain portions of the reasoning on both sides of the issue, seems to weigh more in favor of the private land owner. It appears that the underlying rationale in at least three states expressing the view of the minority is the fear of multitudinous claims against the acquiring agency. *Friesen v. City of Glendale*, *supra*, 288 Pac. at 1083; *Anderson v. Lynch*, *supra*, 3 S.E.(2d) at 88-89; *City of Houston v. Wynne*, *supra*, 279 S.W. at 919.

A complete discussion of the minority views and a concise criticism thereof is presented by Aigler, *Measure of Compensation for Extinguishment of an Easement by Condemnation*, [1945] WIS. L. REV. 1. It is submitted that the reliance placed in the security and benefit of land purchased in a residential district, and the purpose of zoning as related to the public welfare, should constitute a stronger argument for the interests of the restricted property owner. The weight given such a restrictive zoning ordinance in the instant case is emphasized by the fact that the purpose of the zoning ordinance is the protection of a particular class of persons and not for the benefit of the community as a whole. That the right of action flows from a restrictive zoning ordinance as well as from a restrictive private covenant is wholly proper considering the basic principles underlying the zoning of property to particular uses. *Sapiro v. Frisbie*, 93 Cal. App. 299, 270 Pac. 280, 282 (1928).

The nearness of such a structure as a 184 foot water tank to the plaintiff's residence may reasonably be expected to reduce the value of his estate. The operation of the rule that such an owner has a negative easement and thus a compensable property interest will provide for such a loss. Other nearby owners need not suffer a loss of value where it can be shown that, from increased water pressure, reduced fire hazard, and other public benefits, their property actually increased in value from the operation of the water tank. The erection of a public school in a residential neighborhood would have the same effects — injuring the pecuniary evaluation of the property of the immediately adjacent dwellers, and benefiting others in the area.

Therefore, the possibility of multitudinous claims, which is the underlying rationale of the minority view, is not impressive when the court may dismiss more distant claims on the basis of increased, rather than decreased, value and benefits to those claimants from the uses made of the property by the city. Tested in the light of practical considerations, the majority view would appear to be the better solution to this problem and the decision of the court in the instant case awarding recovery to a resident whose house was shadowed by the water tank and blinded by the glare from its silver sides was correct.

Norman H. McNeil.

ESCHEAT — EVIDENCE — EXTENT OF PROOF REQUIRED. — *State v. Otis Elevator Co.*, 10 N.J. 504, 92 A.(2d) 385 (1952). The State of New Jersey in 1949 brought proceedings against the defendant corporation to escheat personal property being held by the corporation, consisting of registered corporate stock and the accrued dividends thereon, which had remained unclaimed for a period of forty years. One Abraham Grenthal, who was the substituted receiver of J. B. Skehan & Co., entered the proceeding, also as a defendant, claiming ownership of the stock and dividends through an assignment by the original owner to his predecessor. The evidence which he offered in support of his contention consisted of (1) a letter, dated October 20, 1909 written by the original owner and addressed to the Otis Elevator Company in which he advised the company that he had assigned the stock shares to the receiver of the J. B. Skehan & Company; and (2) an item in a newspaper at about the same time which contained an account of a transfer and sale of stocks between two companies, there being a possibility that the stocks mentioned could have included the certificate in question in the instant case.

Grenthal offered no evidence that the stock certificate had ever been delivered to the original receiver, nor was he able to produce it at the time of the escheat proceedings. The lower court found that Grenthal had no valid claim and adjudged that the property had escheated to the state. In affirming this judgment, the Supreme Court stated that what Grenthal had offered as evidence in support of his claim failed to meet the qualification of competent evidence clearly establishing his contention.

The issue in the case, as suggested by the dissenting opinion, was whether he should have been required to establish his claim only by a preponderance of the evidence or whether clear and convincing proof was necessary.

The majority opinion was apparently based on the requirements of proof in connection with lost instruments, which place the burden on the

claimant of showing his right by evidence which is clear and convincing, *Superior Oil Co. v. Harsh*, 39 F. Supp. 467 (E.D.Ill. 1941), *aff'd*, 126 F.(2d) 572 (7th Cir. 1942); *Union Baptist Church of Mobile v. Roper*, 181 Ala. 297, 61 So. 288 (1913); *J.A.B. Holding Co. v. Nathan*, 118 N.J. Eq. 382, 179 Atl. 457 (Ch. 1935), *rev'd on other grounds*, 120 N.J. Eq. 340, 184 Atl. 829 (Ct. Err. & App. 1936): clear and certain, *Keniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803 (1903): clear and satisfactory, *In re Nicholls*, 190 Pa. 308, 42 Atl. 692 (1899).

The "clear and convincing" proof requirements have been applied by other courts in cases of escheats. In *re Seddon's Estate*, 110 Colo. 528, 136 P.(2d) 285 (1943). In that case, the petitioners, attempting to prevent the escheat, claimed to be heirs of the decedent whose estate was involved. As proof of their kinship they offered (1) pages from an English city directory showing that a woman whom they alleged was their grandmother had been listed at the same address as the decedent's father at one time; and (2) oral testimony regarding statements by their father that he was an illegitimate child, coupled with some English birth records which indicated that an illegitimate child had been born at about the same time to the woman who might have been the sister of the decedent's father. The court found their claim of kinship to be rested upon conjectural surmises and ingenious inferences, pointing out, 136 P.(2d) at 287, that the petitioners,

... have the burden of proving their relationship to the decedent as a prerequisite to securing such property. . . . "The evidence must be clear and convincing and consist of more than mere conjecture."

In a Michigan case involving a similar issue of proof of kinship to prevent the escheat of an estate, the court found that the petitioners had clearly established satisfactory proof. In *re Wright's Estate*, 268 Mich. 586, 256 N.W. 557 (1934). The proofs offered in that case consisted of letters written by the deceased, Bible entries, proof of personal visits, certified copies of records and documents, all of which were substantiated to a large extent by public records.

Where third persons intervene in an escheat proceeding, as claimants against both the state and the defendant, which is the parallel of the instant case, it has been held that the burden of proof upon such claimants is to establish their title to a legal certainty. *Succession of Townsend*, 40 La. Ann. 66, 3 So. 488 (1887). It was necessary for the intervenors in this case to show that the deceased woman was actually their long missing relative. As proof of this fact they offered oral and written testimony to show a similarity of features, characteristics and habits, as well as the coincidence of the time and circumstances under which the missing relative had disappeared and the deceased woman had appeared. Both the majority and the dissenting opinions in the case agreed that the claimants had the burden of proving their heirship "with reasonable certainty," but disagreed as to the weight to be given the evidence.

In the instant case, the minority opinion reasoned that the claimant in an escheat proceeding "should be required to establish his claim only by a preponderance of the evidence and not by clear and convincing proof." 92 A.(2d) at 390. This position is supported by legal writers. 9 WIGMORE, EVIDENCE § 2498 (3d ed. 1940).

There is also case authority so holding, *Watterson v. Tremaine*, 24 N.Y.S.(2d) 830 (Sup. Ct. 1941), referred to by the dissent in the instant case. The petitioner in this escheat proceeding showed by oral testimony that she was the niece of the deceased whose bank account was the subject of the action. Her evidence showed that she had lived with the deceased for over twenty years, was completely familiar with his handwriting, that she had an accurate and intimate knowledge of his family and pedigree and that the signature in the deposit book was clearly that of her deceased uncle. Her testimony was unchallenged and no contrary proof was ever offered. The court ruled that she had not only proved her claim by a fair preponderance of the evidence, but had gone even farther than she was required.

In *re Link's Estate*, 319 Pa. 513, 180 Atl. 1, 2 (1935), where the claimants, who had lived in Germany, endeavored to prove by *ex parte* affidavits that they were cousins of the decedent, the court affirmed the lower court's ruling for the state, and stated that "the burden rested upon appellants to prove their claim by a fair preponderance of trustworthy and satisfying evidence, as in civil cases." However, the court went on to state, 180 Atl. at 5:

The evidence must be grounded on a reasonable certainty and come from witnesses whose truth and candor are not questioned. To defeat the claim of the commonwealth, the evidence must be so clear, precise, and definite in quality and quantity as to satisfy the court below that the relationship claimed existed.

Here, in one case, are to be found both the conflicting views on this subject of the extent of the proof required of a claimant in an escheat proceeding.

While it cannot be denied that this conflict will remain an important element in the choice of instructions for a jury, a study of the factual situations involved in the few decided cases indicates that the distinction has not generally presented any serious problem of substantive rights, since the evidence adduced has been clearly sufficient or insufficient under either doctrine. The instant case, however, has probably come nearer to presenting the problem squarely on this issue than any other. When viewed under the circumstances of this case, the reasoning offered by the dissenting Justices seems to present the better solution to the problem. It is difficult to find a good reason why an escheat proceeding should be subjected to a more stringent rule regarding burden of proof than any other civil action.

John P. Coyne.

LABOR RELATIONS — UNION UNFAIR LABOR PRACTICE — FEATHER-BEDDING. — *American Newspaper Pub. Ass'n v. NLRB*,U.S., 73 S.Ct. 552 (1953). The International Typographical Union (ITU) demanded that newspaper publishers, upon using advertising mats as molds for metal castings from which to print advertisements, pay printers at regular rates, for setting up duplicate forms for such advertisements in the same manner, though the duplicate mats were not used. The publishers association contended that such activity on the part of the union was a violation of § 8(b)(6) of the Labor Management Relations Act of 1947, 61 STAT. 142 (1947), 29 U.S.C. § 158(b)(6) (Supp. 1952).

The National Labor Relations Board dismissed the "featherbedding" charges against the union, and its order was upheld by a United States Court of Appeals. *American Newspaper Pub. Ass'n v. NLRB*, 193 F.(2d) 782, 801-2 (7th Cir. 1951). The Supreme Court affirmed this decision, holding that the insistence by the ITU that printers be paid for producing advertising matter for which publishers ordinarily have no use was not an unfair labor practice within the anti-featherbedding provision of the Labor Management Relations Act because the union sought payment for work actually done and not for work not performed or not to be performed.

Section 8(b)(6) makes it an unfair labor practice on the part of a union:

... to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

A provision of similar import, § 506(a) of the Communications Act, 48 STAT. 1064 (1934) as amended, 60 STAT. 89, 47 U.S.C. § 506 (1946), was upheld as constitutional in *United States v. Petrillo*, 332 U.S. 1 (1947). The language of that statute makes it a criminal offense to wilfully coerce another to employ workers not needed by the employer. By analogy, the Court might have reasonably concluded that to require an employer to pay for the resetting of type that is never to be used by him is nothing more than make-work activity, and as such prohibited as an unfair labor practice within the anti-featherbedding provisions of the Labor Management Relations Act of 1947.

The Court chose, however, in the instant case, to apply a strict and literal interpretation to the provision and found that the union's insistence that its members be paid for duplicating advertising forms which were never to be used was not a demand "for services which are not performed or not to be performed." In the companion decision, *NLRB v. Gamble Enterprises, Inc.*, 73 S.Ct. 560 (1953) the Supreme Court ruled that the demand of a musicians union that a theater employ a local orchestra to play overtures, intermissions, "chasers" and like numbers, as a condition of its consent to local appearance of travelling bands, was similarly not a demand for "services which are not performed or not to

be performed." The Court said that payments for "standing by" were not payments for services performed, but emphasized that the condition imposed by the union here was that local musicians actually be permitted to play, and therefore did not fall within the prescribed category. The fact that the employer did not need the local musicians nor desire their services did not alter the fact that they were not demanding pay for unperformed services, and this is the full extent of the definition in the statute.

It is apparent therefore, that the main issue in these two cases was whether work or services to be actually performed, although forced upon the employer against his will, is within the definition of an unfair labor practice as set out in § 8(b)(6) of the Labor Management Relations Act.

In *Tennessee Coal, Iron and R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), the Court held that any time spent by iron ore miners in travelling underground in the mines to their places of work constituted work itself, for which compensation was required. The miners travelling underground were engaged in a process or occupation which was necessary to actual production; and such activity on their part was more than mere standing and waiting for work. The reason such travel time constituted compensable work is obvious. During their hazardous journey into the depths of the mine, which journey was required by their employer, the miners were actually working because they were forced by necessity to maintain a constant vigilance to avoid such dangers as low ceilings, overhanging beams, pitfalls and other obstacles.

A similar decision was rendered one year later in the closely analogous situation of bituminous coal miners. *Jewell Ridge Coal Corp. v. Local No. 6167 (UMW)*, 325 U.S. 161 (1945). The ruling stated that all mental or physical exertion whether burdensome or not is compensable if it is either controlled or required by the employer and pursued primarily and necessarily for his benefit.

The conclusion was reached in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) that various preliminary activities of employees after arriving at their work benches constituted compensable work where such activities were controlled or required by the employer and were pursued necessarily and primarily for his benefit. The tribunal said in 328 U.S. at 693:

These activities . . . involve exertion of a physical nature, controlled or required by the employer and pursued necessarily and primarily for the employer's benefit. They are performed solely on the employer's premises and are a necessary prerequisite to productive work. . . . Hence they constitute work that must be accorded appropriate compensation under the statute.

These cases suggest that the proper test to determine whether work or services is compensable is whether it is required by, or is under the con-

trol of, the employer and pursued necessarily and primarily for his own economic benefit in the operation of his business. To say that the services involved in the instant case fell within the category of compensable work would be a gross distortion of fact. The publishers neither required nor wanted the advertising forms duplicated. The typesetters were merely whiling away the hours until some other job came along that they could do and were putting forth no productive effort on behalf of the employer whatsoever.

It seems reasonable to believe that the "featherbedding" provision of the Labor Management Relations Act could have been rendered more meaningful by the application of this test rather than by a strict literal interpretation of the precise words used. The use of technical interpretation in regard to labor-management relations statutes is mildly reminiscent of the decision in *Duplex Co. v. Deering*, 254 U.S. 443 (1921), which many jurists and writers believe resulted in reading into Section 20 of the Clayton Act, 38 STAT. 738 (1914), 29 U.S.C. § 52 (1946) the very beliefs which that Act was intended and designed to remove. The unfortunate results that followed that "strict interpretation" decision had to be finally corrected by legislation in the form of the Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U.S.C. §§ 101-115 (1946).

However, the instant case indicates that the present-day trend in American courts is to favor a strict interpretation of the anti-featherbedding provisions. Therefore, when a man is engaged in any sort of mental or physical exertion, whether or not it is productive, needed or wanted by his employer, he is earning his wages fairly and is not engaged in any type of unfair labor practice when he demands payment therefor. The soundness of the rule can be ascertained only through the application of the most stern test of all — that of time.

Mark S. Tolle.

TORTS — CHARITABLE INSTITUTIONS — IMMUNITY FROM LIABILITY AS AFFECTED BY LIABILITY INSURANCE. — *Meade v. St. Francis Hospital of Charleston*,W. Va....., 74 S.E.(2d) 405 (1953). In an action for trespass on the case in the death of the plaintiff's decedent, a day-old infant daughter, due to the alleged negligence of the employees of the defendant charitable hospital, the circuit court certified two questions to the Supreme Court of Appeals of West Virginia. The first concerned the tort liability of a charitable hospital, as distinguished from a corporation organized for profit, towards a paying patient for negligent acts of its servants. In answer to this question, the court followed the rule it had enunciated in previous decisions: that a charitable hospital, by public policy, is not liable for injuries to its patients, paying or non-paying, resulting from the negligence of its servants, agents or employees in the

absence of a showing of negligence in the selection of those servants, agents and employees. *Fisher v. Ohio Valley General Hospital Ass'n*, 73 S.E.(2d) 667 (W. Va. 1952); *Roberts v. Ohio Valley General Hospital*, 98 W. Va. 476, 127 S.E. 318 (1925).

The second question presented was whether the procurement of liability insurance coverage or the ownership of properties and assets in excess of the needs of the charitable trust renders a charitable hospital liable in tort for injuries sustained at the hands of its agents. Having established the immunity of a charitable hospital from liability generally on the basis of stare decisis, in answer to the first question, the court again turned to one of its own prior decisions, *Fisher v. Ohio Valley General Hospital Ass'n*, *supra*, for the answer to the second issue, and denied that such immunity would be affected by the fact that the hospital maintained liability insurance coverage.

Why do charitable institutions secure liability insurance in jurisdictions where they are immune from liability? The obvious reason is their prudent recognition that the substantive law is always subject to change or modification. Still another reason was given by the court in *Schau v. Morgan*, 241 Wis. 334, 6 N.W.(2d) 212, 216 (1942):

We will take notice that public liability insurance policies cover the cost of defense. When a charitable institution is made a defendant it must defend the action whether or not it can be held liable. No doubt, charitable institutions deem it good business judgment to protect themselves against the costs of the defense of such actions, as well as from loss through liability imposed by law.

The dictum in the instant case suggests a third reason, namely, that even in jurisdictions which grant immunity for negligent acts of servants or agents, the institution may be liable for negligence in the selection of its personnel in the first place.

The lines of reasoning both for and against the fixing of liability because of insurance coverage has been fairly consistent, even though the immunity in the first place may have been granted on the basis of any one or a combination of five main theories: the trust-fund theory, the governmental-immunity theory, the respondeat superior-inapplicable theory, the beneficiary-waiver theory or the public policy theory. See Note, 25 A.L.R.(2d) 57 (1952).

Four states that admit the trust fund theory of immunity, *i.e.* that the funds of a charity are held in trust, the diversion of which the courts will not permit, have denied that liability insurance would affect such immunity. *Levy v. Superior Court of California*, 74 Cal. App. 171, 239 Pac. 1100 (1925); *Enman v. Trustees of Boston University*, 270 Mass. 299, 170 N.E. 43 (1930); *Greatrex v. Evangelical Deaconess Hospital*, 261 Mich. 327, 246 N.W. 137 (1933); *Herndon v. Masset*, 217 N.C. 610, 8 S.E.(2d) 914 (1940). Wisconsin, in refusing to be influenced by the presence of insurance, predicated immunity on both the "inapplicability

of respondeat superior," and the analogous governmental immunity granted to organizations performing quasi public functions. *Schau v. Morgan, supra*, 6 N.W.(2d) at 215. Two states uphold immunity under the public policy theory despite insurance coverage. *Woods v. Overlook Hospital Ass'n*, 6 N.J. Super. 47, 69 A.(2d) 742 (App. Div. 1949); *Roberts v. Ohio Valley General Hospital, supra*. Insurance does not influence a combination of the trust fund and public policy theories. *Dillie v. St. Luke's Hospital*, 355 Mo. 436, 196 S.W.(2d) 615 (1946).

One argument in favor of fixing liability upon charitable institutions protected by liability insurance is based on the assertion that a judgment against the institution in such case would not deplete or divert the charitable funds from their original purpose. *O'Connor v. Boulder Colorado Sanitarium Ass'n*, 105 Colo. 259, 96 P.(2d) 835 (1939). But this argument has been answered in *Levy v. Superior Court of California, supra*, 239 Pac. 1102, where the court pointed out that such a rule would give the trustees of the charity the power to create liability or waive exemption. Such capacity would then accomplish by indirect action that which could not be done directly, in effect, destroying the safeguards for the protection of the trust funds.

Another court has accounted to its own satisfaction for the imposition of liability on account of the mere presence of liability insurance. The court in *Wendt v. Servite Fathers*, 332 Ill. App. 618, 76 N.E.(2d) 342, 349 (1947) stated:

We hold that where insurance exists and provides a fund from which tort liability may be collected so as not to impair the trust fund, the defense of immunity is not available.

Some liability insurance contracts contain a clause expressly authorizing the insurer to use the defense of immunity of the charitable hospital. Such a clause reduces the premium rate. If the court denies immunity in a case involving such a contract, it is, in effect, substantially altering the contract between the parties. Even though new risks must always be anticipated by insurers, it is not normally foreseeable that the making of the contract would destroy a defense on which it was formulated. That the substantive law might be changed is a business risk of the insurer and a possible vindication of the prudence of the insured, but to permit the fact that the contract of insurance has been entered into to destroy the immunity upon which it was premised would make it paradoxical in its own terms.

Does the distinction in liability based on the presence of insurance coverage alone have a logical basis? The theory is that under such a rule a patient in an insured hospital could recover while a patient injured under identical circumstances, but in an uninsured hospital, could not recover. In *Fisher v. Ohio Valley General Hospital Ass'n, supra*, 73 S.E.(2d) at 672, the court expressed its reluctance to descend into "a quagmire of judicial confusion" that has become the fate of the courts that have attempted to make a distinction because of insurance coverage.

Courts could escape from the dilemma by repudiating the immunity theory in its entirety. In Iowa this was done, ostensibly on the basis that the public policy considerations that demanded the immunity in the first place had changed. But here too, there is reason to wonder if insurance coverage was not the determinant of "public policy", the court stating in *Haynes v. Presbyterian Hospital Ass'n*, 241 Iowa 1269, 45 N.W.(2d) 151, 154 (1950):

Also, we take judicial notice of the extensive use of the many types of hospital insurance, as well as liability insurance by the institutions. Thus it is evident that times have changed and are now changing in the business, social, economic and legal worlds.

Colorado and Illinois have fixed liability on the ground that insurance protection would prevent depletion of the trust fund. *O'Connor v. Boulder Sanitarium Ass'n*, *supra*; *Moore v. Moyle*, 405 Ill. 555, 92 N.E.(2d) 81 (1950). In accord with the view that would hold charitable institutions liable for the tortious acts of their servants or agents, a Mississippi court abandoned all the theories of immunity and emphasized the effect which the presence of insurance coverage played in its decision by attempting to minimize it. *Mississippi Baptist Hospital v. Holmes*, 55 So.(2d) 142, 153 (Miss. 1951), *aff'd*, 56 So.(2d) 709 (Miss. 1952).

The West Virginia court, in the instant case followed the present majority rule by refusing to allow the factor of insurance coverage to change *in toto* or even in degree the immunity from tort liability so far enjoyed by charitable institutions under its jurisdiction. What longevity this rule will attain in the face of the ever increasing public recognition of the ability of insurance companies to distribute the risk and pay huge awards remains to be seen.

Robert D. LeMense.

TORTS—INJURIES SUSTAINED THROUGH DEFECTS IN ICE OF SKATING RINK — CONTRIBUTORY NEGLIGENCE AND/OR ASSUMPTION OF RISK. — *Filler v. Stenvick*,N. D....., 56 N.W.(2d) 798 (1953). The plaintiff, a boy thirteen years old, sued through his guardian for injuries sustained at an outdoor skating rink. The injury occurred when one of the boy's skates was caught in a crack in the ice causing him to fall and break his leg. The crack was alleged to have been the sole cause of the injury, and evidence proved that the plaintiff was unaware of the defect in the ice when the injury occurred. The defendant, in his answer, alleged that the plaintiff was guilty of contributory negligence.

The Supreme Court of North Dakota affirmed the *non obstante verdicto* judgment in favor of the defendant. The affirmance was based on two grounds, the first of which, that the defendant had exercised due

care, raises no real issue. The second ground offered, however, was that the plaintiff had assumed the risk by going skating. As a ground for affirming the lower court decision, assumption of risk presents an interesting question since there had been no such defense offered below; the defendant rather had pleaded contributory negligence on the part of the boy. The defenses of contributory negligence and assumption of risk are often employed as defenses in negligence actions with little attempt made to distinguish between them. What, if any, is the distinction between contributory negligence and assumption of risk?

The distinction is often ignored by courts or is held to be irrelevant. In Minnesota, the distinction is regarded as pertinent only in cases involving a master-servant relationship at common law. *Hubenette v. Ostby*, 213 Minn. 349, 6 N.W.(2d) 637 (1942). Whenever a person does not use the care of a reasonable man in avoiding occasions of injury as well as when he forgoes the necessary precautions to avoid injury after he finds himself in peril, he is guilty of contributory negligence. The very act of entering a dangerous situation in disregard of his own safety is a negligent act, and it therefore contributes to his own injury. *Gates v. Kuchle*, 281 Ky. 13, 134 S.W.(2d) 1002 (1939) (parking car on highway); *Poole v. Lutz & Schmidt, Inc.*, 273 Ky. 586, 117 S.W.(2d) 575 (1938) (passing through wall being demolished).

The jurisdictions which do distinguish between contributory negligence and assumption of risk base their distinctions on divergent principles. In *Daniel v. Tower Trucking Co.*, 205 S.C. 333, 32 S.E.(2d) 5 (1944), the court held that the distinction was based on the difference between contract and tort, assumption of risk arising from the former and contributory negligence from the latter. Therefore, the defendants' contention that the wife was guilty of assumption of risk in riding with her husband was invalid because there was no contractual duty between them.

In *Hunn v. Windsor Hotel Co.*, 119 W.Va. 215, 193 S.E. 57 (1937) a hotel guest fell while walking upon planks covering new cement steps. Since he knew that they were dangerous, the court in denying recovery held that plaintiff may be precluded from recovery when he assumes the risk by voluntarily encountering a known danger even though he uses more than ordinary care for his safety. Here the court, in distinction to *Daniel v. Tower Trucking Co.*, *supra*, stated that the distinction was not based on any contractual relationship, but rather that the distinction lies in that the essence of assumption of risk is venturousness, while that of contributory negligence is carelessness.

The courts have made a further distinction based on the doctrine of proximate cause. *Warner v. Markoe*, 171 Md. 351, 189 Atl. 260, 264 (1937); *McEvoy v. City of New York*, 266 App. Div. 445, 42 N.Y.S.(2d) 746, 749 (2d Dep't 1943), *aff'd*, 292 N.Y. 654, 55 N.E.(2d) 517 (1944). In the latter case, the plaintiff tenant fell in a hole in front

of her house. The city was denied the defense of assumption of risk, the court stating that assumption of risk is predicated on the maxim *volenti non fit injuria*. Thus, if a person voluntarily enters a known and appreciated dangerous situation, he is regarded as waiving any duty that might be owing to him by another because of his implied consent to the injury inflicted upon him. Because of his anticipatory denial of any duty owing to him, it is immaterial that the plaintiff was free from contributory negligence.

Contributory negligence, on the other hand, bars recovery because of the fact that it intervenes between the defendant's negligence and the plaintiff's injury so that it supersedes the defendant's negligence as the proximate cause of the injury. This being the case, no liability attaches to the defendant's negligence.

In conformity with this distinction, the doctrine of contributory negligence is imposed when the plaintiff fails to exercise the degree of care that the law imposes for his own safety and well being, *Oberheim v. Pennsylvania Sports and Enterprises, Inc.*, 358 Pa. 62, 55 A.(2d) 766, 769 (1947); while assumption of risk "is predicated upon the theory of knowledge and appreciation of the danger and voluntary assent thereto." *Bouchard v. Sicard*, 113 Vt. 429, 35 A.(2d) 439, 440 (1944).

In taking into consideration the problem of participation in athletic activities, the distinction based on proximate cause is adhered to. A participant, employee or spectator is deemed to have voluntarily assumed the risk of any injury which he might incur as an ordinary consequence of his activity, such as a caddy being struck by a golf ball, *Page v. Unterreimer*, 106 S.W.(2d) 528 (Mo. App. 1937); a skater being injured due to irregularities in the surface of the ice in a skating rink, *McCullough v. Omaha Coliseum Corp.*, 144 Neb. 92, 12 N.W.(2d) 639 (1944); repeated falls incurred by a nine year old boy while participating in the sport afforded by the defendant's public roller skating rink, *Blizzard v. Fitzsimmons*, 193 Miss. 484, 10 So.(2d) 343 (1942); a fall and subsequent injury sustained by the plaintiff while participating in an organized basketball game, *Paine v. Young Men's Christian Ass'n*, 91 N.H. 78, 13 A.(2d) 820 (1940); or in diving from a wet diving board, *Englehardt v. Philipps*, 136 Ohio St. 73, 23 N.E.(2d) 829 (1939).

When the danger is so apparent that the ordinary prudent man would not hazard the risk of injury, the plaintiff is guilty of contributory negligence in assuming such a flagrant risk. Thus, the plaintiff was guilty of contributory negligence when she continued skating after realizing that the ice was getting softer and danger of injury was imminent. *Shields v. Van Kelton Amusement Corp.*, 228 N.Y. 396, 127 N.E. 261 (1920); cf. *Walker v. Rose Hill Amusement Co.*, 167 So. 144 (La. App. 1936).

In *McCullough v. Omaha Coliseum Corp.*, *supra*, the ruts in the ice of a skating rink became covered with ice shavings during the course of

an evening. The plaintiff fell and while in this prone position, his hand was severely injured when a skater approaching from behind skated over the outstretched hand. The plaintiff was held to have assumed the risk inherent in the unevenness of the surface of the ice, although he did not foresee the exact cause of his injury. It was sufficient that he recognized some risk in the uneven surface of the skating rink.

Assumption of risk being predicated on knowledge and appreciation of the risk, the age, experience, and intelligence of the participant must be considered in determining whether he was capable of assuming the risk. It is evident, therefore, that a child must not be held to the same standard as an adult in determining whether he voluntarily assumed the risk, but the assumption is that anyone who is capable of intelligently participating in a sport is capable of knowing and appreciating the dangers thereof. *Englehardt v. Philipps, supra*.

The rules set forth in the instant case indicate that North Dakota follows those courts which distinguish between contributory negligence and assumption of risk on the basis of proximate cause. When the contributory negligence of the injured person is such as to proximately cause the injury complained of, he is denied any recovery. In this case, however, the plaintiff was not guilty of any negligence on his own part so that the only proper defense would be assumption of risk. The plaintiff assumed the risk of any irregularities or inequalities of the surface of the ice when he chose to skate on the defendant's skating rink. That the plaintiff was unaware of the crack which caused the injury is immaterial, for he entered the rink with full knowledge and appreciation of the danger that might be incurred. Therefore, the decision rendered on this ground, regardless of the allegations, was correct.

Michael C. Dionise.

TORTS — MUNICIPAL CORPORATIONS — COLLECTION AND DISPOSAL OF GARBAGE AS A PROPRIETARY FUNCTION.—*Hutton v. Martin*, Wash., 252 P.(2d) 581 (1953). The plaintiff, as administratrix of the estate of her husband, brought this action for his wrongful death against the city of Grandview and its employee, the driver of the garbage truck which collided with the deceased's automobile. The evidence presented was contradictory, the truck driver claiming that the deceased was driving on the wrong side of the road, though evidence was also presented tending to show that the truck driver was himself on the wrong side of the road. The jury accepted the evidence of the plaintiff and returned a verdict against both defendants.

However, the trial court granted the city's motion for a judgment *non obstante verdicto*, basing their action on a previous Washington decision,

Krings v. City of Bremerton, 22 Wash.(2d) 220, 155 P.(2d) 493 (1943), which had ruled that the collection of garbage was a governmental function, in the operation of which municipalities are not liable for torts. On appeal, the Supreme Court of Washington overruled the decision in the *Krings* case, establishing as the law in that state today that garbage collection is a proprietary and not a governmental function, and that, therefore, the city was liable.

There appears to be a clear split in the authorities as to whether garbage collection and like activities on the part of municipalities are governmental or proprietary functions. This decision by the Washington Supreme Court, particularly since it required an express overruling of a previous decision, may indicate a trend in this field.

The basic principle behind the immunity given to municipalities is stated in *Riddoch v. State*, 68 Wash. 329, 123 Pac. 450, 452 (1912):

Municipal corporations enjoy their immunity from liability for torts only in so far as they partake of the state's immunity, and only in the exercise of those governmental powers and duties imposed upon them in representing the state.

See also 18 McQUILLIN, MUNICIPAL CORPORATIONS § 53.01, (3d ed. 1950). Therefore, when the municipality is acting for its own benefit in its corporate capacity, it is liable. *Riddoch v. State*, *supra*. The courts are thus presented with the problem of separating all the activities of a municipality into non-labile governmental activities and liable corporate activities. On which side of the dividing line fall such things as fire protection, the operation of a toll bridge, garbage collection, running a gas plant or the collection of junk, to mention a few? Are they governmental or corporate functions?

The courts frequently ask: is this activity carried on by the municipality one that the state has an interest in encouraging in that it benefits all the citizens of the state? In *City of Pass Christian v. Fernandez*, 100 Miss. 76, 56 So. 329 (1911), the court held that hauling trash is not a duty the states owes to all its citizens and therefore, a city in doing this does not share in the sovereignty and immunity of the state.

In *City of Brunswick v. Volpian*, 67 Ga. App. 654, 21 S.E.(2d) 442 (1942), plaintiff's husband was killed when a city garbage truck was negligently backed over the sidewalk upon which he was walking. Recovery was denied by the Georgia court which held that the collection of garbage by a municipality is a governmental function, on the grounds that the city is acting for the public health. In *Imes v. City of Fremont*, 58 Ohio App. 335, 16 N.E.(2d) 584 (1938), an Ohio court recognized garbage collection as a governmental function, indicating a trend in that state which would recognize all municipal activities which promote health and sanitation as protected activities of the sovereign.

The majority position on this point is well stated in *Scibilia v. City of Philadelphia*, 279 Pa. 549, 124 Atl. 273, 276 (1924):

The care of public health is undoubtedly a subject-matter of general concern, and how it shall be accomplished is a public question. When the Legislature leaves its accomplishment to any degree in the hands of the municipalities, they act as government agencies, and not as business corporations. . . . That cleanliness makes for health must be accepted as a truism, and that the regular systematic gathering by municipalities of refuse, including ashes, and the proper, orderly and efficient disposal thereof promotes cleanliness, is apparent.

The Oklahoma court, in *Spaur v. City of Pawhuska*, 172 Okla. 285, 43 P.(2d) 408 (1935), recognized that the great weight of authority regards the cleaning of streets and the collection of garbage as a health measure and a governmental function, and therefore, no liability would attach to the city for injuries inflicted through negligence in carrying them out.

The minority position, on the other hand, refuses to recognize any good reason for denying recovery from the municipality to a citizen injured or otherwise harmed through the negligence of one of its agents. *Kaufman v. City of Tallahassee*, 84 Fla. 634, 94 So. 697, 699 (1922); *City of Tallahassee v. Kaufman*, 87 Fla. 118, 100 So. 150, 152 (1924).

Consistent with this denial of municipal immunity, the Florida courts, to distinguish between governmental and proprietary functions, apply the test whether the city's activity works "for the specific benefit and advantage of the urban community embraced within the corporated boundaries" or for the benefit of the people of the state outside as well as within the city. Such a test was applied in *Chardkoff Junk Co. v. City of Tampa*, 102 Fla. 501, 135 So. 457 (1931), where the court held that maintaining an incinerator for burning refuse was a proprietary activity, declaring, 135 So. at 459-60:

[The incinerator] is especially maintained to peculiarly promote the comfort, convenience, and welfare of the citizens of the municipality, and such benefits are not enjoyed by, nor do the results accomplished affect, the general public beyond the corporate limits.

Consequently, when the issue as to the nature of garbage collection arose in a later case, it was declared to be a proprietary function as it benefited only the people within the city of Tampa. *Amoak v. City of Tampa*, 123 Fla. 716, 167 So. 528 (1936). Cf. *City of Pass Christian v. Fernandez, supra*.

In the instant case, the court noted that the decision in *Krings v. City of Bremerton, supra*, which had been cited by the lower court as controlling, seemed to flow from the holding of a still earlier case, *Hagerman v. City of Seattle*, 189 Wash. 694, 66 P.(2d) 1151 (1937). In this latter case, a truck maintained by the health department of the city of Seattle was carrying empty vegetable crates, laundry, and medical equipment from a tubercular sanatorium partly maintained by the city. The truck collided with plaintiff's car injuring him. The court, in denying liability, held that the service rendered by the truck at the time was a governmental function "in the interest of the public generally and not for the city specially."